

# SIFTING THROUGH THE WEEDS:

A Primer on Federal Laws Regulating CBD Oil



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**C**annabidiol (CBD), a compound derived from the cannabis plant, is today's "it" ingredient, used in everything from supplements and cosmetics to foods and curated cocktails. Confusion surrounds the legality of using CBD oil in consumer products, stemming in large part from different treatment of cannabis under states' laws and the federal government's continued classification of cannabis—or marijuana—and cannabis extracts as Schedule I drugs under the Controlled Substances Act (CSA). This much is clear: CBD is the non-psychoactive cannabinoid—or compound—found in cannabis, which does not produce a high, and, as the U.S. Food and Drug Administration (FDA) acknowledges, has numerous medical benefits. What is less than clear is how companies can make sense of the myriad and sometimes conflicting federal laws that regulate the sale, cultivation, and marketing of products containing CBD oil. This article sifts through some of this confusion by pro-

viding an overview of marijuana and CBD oil, a review of the current federal regulatory environment, and a discussion of efforts underway to change federal oversight of marijuana.

## Marijuana and CBD Oil

Cannabis, mainly known by its varieties marijuana and hemp, is a genus of plant that contains more than 100 cannabinoids, or chemicals, the two most famous of which are tetrahydrocannabinol (THC—the psychoactive compound that produces a high) and CBD (the non-psychoactive compound that does not). The amount of THC and CBD found in cannabis varies greatly. Plants grown for cultivation of marijuana typically have between 5 to 25 percent THC, while those grown for industrial hemp contain no more than 0.3 percent THC.

The CSA defines marijuana as "all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of such

plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." The definition excludes "the mature stalks of such plant; fiber produced from such stalks; oil or cake made from the seeds of such plant; any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seeds of such plant, which is incapable of germination."

CBD oil comes from both (1) parts of the cannabis plant that meet the definition of marijuana and (2) parts of the plant that fall outside the definition. CBD derived from the parts of the plant that meet the definition of marijuana is a Schedule I drug, which the CSA defines as a substance or chemical with no currently accepted medical use and a high potential for abuse. CBD from non-marijuana parts of the cannabis plant, by contrast, are known to have a number of medical benefits, ranging

from antioxidant properties to prevention or treatment of epilepsy.

### The Muddled CBD Regulatory Scheme

The United States Drug Enforcement Administration (DEA) is the lead federal agency charged with enforcing the CSA. Each controlled substance is assigned what is known as a “drug code” that is used by DEA to track the substances. At the end of 2016, DEA created a new drug code for “marijuana extracts,” another Schedule I drug separate and apart from the originally listed “marijuana.” On May 22, 2018, DEA issued a clarification of the new drug code for marijuana extract explaining that the new code applies only to those extracts that fall within the CSA definition of marijuana. Unfortunately, other pronouncements by DEA muddy the purportedly clear-cut distinction between CBD that meets the definition of a Schedule I marijuana drug and legal CBD that comes from non-marijuana parts of the cannabis plant.

The Department of Justice (DOJ) enforces the CSA through civil and criminal investigations and prosecutions. When the current administration withdrew an Obama-era guidance, it seemed to imply that its intention was to step up marijuana enforcement, but earlier this year, after additional states legalized marijuana, DOJ indicated its intent to focus on bigger fish, like drug cartels and conspiracies.

Classification of marijuana and marijuana extract as Schedule I drugs under the CSA is belied by numerous studies confirming the medical benefits of marijuana and FDA’s recent approval of an epilepsy drug containing CBD, as well as its approval of drugs containing synthetic forms of THC for the treatment of anorexia associated with weight loss due to AIDS. These developments, as well as sweeping legalization of marijuana in many states, motivated Congress to act. Through its appropriation powers, Congress has repeatedly blocked the use of federal funds to enforce and prosecute marijuana-related violations of CSA in states that have legalized medical marijuana; however, these are only short-term fixes. Attempts to legislate more permanent fixes are the subject of numerous bills making their way through Congress.

### Current Federal Legislative Initiatives

Senate Majority Leader Mitch McConnell, hoping industrial hemp will be as profitable for Kentucky farmers as tobacco crops once were, introduced The Hemp Farming Act of 2018 (Farm Act) to

replace the 2014 Farm Act, which expires on September 30, 2018. The Farm Act, which defines industrial hemp as cannabis that contains no more than 0.3 percent THC by dry weight, including the whole plant and extracts, would remove it from Schedule I of the CSA and would loosen certain restrictions on banking, water rights, and other regulatory barriers, while giving states primary regulatory authority over cannabis. The House introduced its own version of the Farm Act, the Agricultural and Nutrition Act of 2018, which does not include hemp provisions. Both bills passed earlier this summer and now await what may be contentious efforts to reconcile the two versions.



Earlier this summer, Senate Minority Leader Chuck Schumer introduced the more expansive Marijuana Freedom and Opportunity Act, which would remove marijuana from the list of CSA scheduled substances, effectively decriminalizing it on the federal level, and leave intra-state regulation to each individual state. The federal government would retain the authority to prevent trafficking between states where it is legal and where it is not and oversee advertising to prevent its targeting to children.

A bipartisan Senate marijuana bill, the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act), proposes the most sweeping legislative reform. Although the STATES Act does not remove cannabis from Schedule I of the CSA, it would give each state the freedom to address commercial cannabis within its borders, cease treating state-approved commercial cannabis activity as drug trafficking, and no longer subject proceeds and assets used in legal cannabis operations to forfeiture by DOJ. The STATES Act also would remove industrial hemp from

the CSA, preclude dispensing non-medical marijuana to anyone under the age of 21, and preclude any state-sanctioned marijuana business from employing anyone under the age of 18. An amendment would also prevent DOJ from interfering with a state’s right to implement medical marijuana laws and make it illegal for DOJ to enforce the CSA against state-sanctioned marijuana users or medical or recreational marijuana businesses.

Any of these legislative measures, if enacted, would provide much-needed clarity for sellers of CBD products. Unfortunately, given the impending expiration of the 2014 Farm Act, other legislative priorities competing for regulatory attention, and a poor record of passing bipartisan legislation, chances are good that the confusion and uncertainty surrounding CBD oil will continue.

### Conclusion

Marijuana is illegal under federal law, which means that any company contemplating the sale of products containing CBD oil does so at its own peril. Playing in the cannabis space is not “risk free,” but with strict due diligence and properly structured product claims, companies can incorporate non-marijuana CBD into their products with what should be minimal risk. The key is to work with trusted vendors and advisors and secure certifications to support the non-marijuana source of CBD. All interested parties should pay close attention to legislative developments in this changing landscape and consider contacting elected officials in support of Congressional efforts to decriminalize the marketing and sale of products containing industrial hemp and CBD oil. **NIE**



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